Supreme Court, U.S.
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No. 94-638

In The Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF MICHIGAN,
DEPARTMENT OF MENTAL HEALTH,
Petitioner,

v.

LOUISIANA HOMES, INC., AND
AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES
(AFSCME), MICHIGAN COUNCIL 25,
AFL-CIO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF IN OPPOSITION AND APPENDIX

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STATEMENT OF FACTS

The Michigan Department of Mental Health ("MDMH" or "the Department") is the state agency charged with implementing Michigan's constitutional mandate that care, treatment, education and rehabilitation for those who are handicapped "...shall always be fostered and supported." 1963 Const, art 8, sec 8. In implementing that mandate, the MDMH has entered into form contracts with non-profit corporations to provide residential care for developmentally disabled persons.

In 1986, the American Federation of State, County and Municipal Employees (AFSCME) launched the first attempt to organize a facility providing that care — C K Homes, Inc. After AFSCME filed a petition with the Michigan Employment Relations Commission (MERC) seeking a representation election under state law, C K Homes filed a petition at the National Labor Relations Board pursuant to Section 9(c)(1)(B) of the National Labor Relations Act ("the Act"), 29 USC 159(c)(1)(B). Using the powers delegated to him by the NLRB,[1] the Regional Director conducted extensive hearings and then issued a decision which detailed the all-encompassing control which the MDMH retained over the operations of C K Homes. On the basis of this control, the Regional Director dismissed the petition, concluding as follows:

> While there is no evidence that the Employer [C K Homes] was created by the State, it is clear that the Employer has no life independent of its symbiotic ties to the State of Michigan. The State has delegated its responsibility for these developmentally disabled individuals to the Employer and yet has retained substantial control over how the service is to be delivered and its labor costs.
>
> Thus, the employer might be considered tantamount to an administrative arm of government and not within the definition of section 2(2) of the Act. In addition, the control possessed and exercised over the employer's operations by

[1] See 29 USC 153(b), 29 CFR 101.17-101.21.

the State of Michigan makes meaningful collective bargaining impossible. *C K Homes, Inc.*, NLRB Case No. 7-RM-1275 (2-14-86) (Resp App at A-1 - A-10, at A-9).

Two years later, the United Automobile Workers filed a petition at the National Labor Relations Board under Section 9(c)(1)(A) of the Act, 29 USC 159(c)(1)(A), seeking representation rights at Residential Systems, Inc, another corporation operating homes for the developmentally disabled under the form contract with the MDMH. After another full hearing, the Regional Director dismissed the UAW's petition on the grounds that collective bargaining was not "... possible because of the extensive control over [the home's] labor relations by the State of Michigan." *Residential Systems, Inc.*, NLRB Case No. 7-RC-18529 (4-7-88) (Resp App at A-11 - A-19, at A-18).

With the Board's handwriting covering the wall, the Respondent here, Michigan Council 25, AFSCME, filed a petition at the Michigan Employment Relations Commission (MERC) seeking a representation election under state law at Louisiana Homes, another corporation operating homes for the developmentally disabled under form contracts with the MDMH. As amended, AFSCME's petition named the MDMH and Louisiana Homes as joint employers. Louisiana Homes concurred in that description of the relationship between it and the Department, and the Department refused to contest it or to participate at all in the hearings before MERC. Despite this, MERC still held extensive hearings on the relationship of the Louisiana Homes to the Department.

In its first decision, MERC raised, sua sponte, the issue of possible preemption of its jurisdiction by the National Labor Relations Act. After comparing the contracts before it with those detailed in *C K Homes* and *Residential Systems*, however, MERC concluded that the Board would decline jurisdiction because Louisiana Homes was governed by "the same type of contract" over which the Board had declined jurisdiction at C K Homes and Residential Systems. *Louisiana Homes/MI DMH*, 1989 MERC Lab Op 51, 56 (Pet App at 44a-46a). On the merits, MERC surveyed the extensive power which the MDMH had retained in

those contracts,[2] and, on that basis, concluded that Louisiana Homes and the MDMH were joint employers of the employees in the group homes operated by that corporation. *Louisiana Homes/MI DMH,* 1989 MERC Lab Op at 59 (Pet. App at 53a-54a).

On the very day which MERC had scheduled for an election among the employees at Louisiana Homes, the MDMH filed a delayed motion for rehearing, asserting that MERC's decision conflicted with the requirements of the Michigan Constitution, and a motion for a stay pending the resolution of subsequent state court litigation in what the Department termed the "very similar situation" at C K Homes. The Michigan Civil Service Commission joined in the request for a stay, because of what it called the "virtually identical case" of C K Homes.[3] [Resp App at A-20-A-27 (excerpts), at A-23 and A-27]

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[2]Among other powers, MERC found that under MDMH's form contract, imposed on Louisiana Homes, the MDMH wholly funded the home's operations, mandated the amounts spent on wages and other compensation, specified the average hourly wage for employees, dictated the staffing levels, provided mandatory training for all new hires, and investigated alleged violations of patients' rights, with the MDMH retaining the power to effectively recommend the discipline of any home employee it found to have violated those rights. *Louisiana Homes Inc./MI DMH*, 1989 MERC Lab Op at 54-55 (Pet App at 37a-42a)

[3]The MDMH and the Michigan Civil Service Commission were referring to subsequent litigation in which the Commission considered the same facts which had led the NLRB Regional Director to dismiss the petition.

In the subsequent state litigation, a Civil Service Commission hearing officer found that employees of C K Homes were so closely regulated by the State of Michigan that he recommended their induction into the State of Michigan classified service as required for state employees under Article 11, Section 5 of the 1963 Constitution of the State of Michigan. On appeal, the Michigan Civil Service Commission reversed the hearing officer's recommendation. On further appeal, the Ingham County Circuit Court reversed the Commission and reinstated the decision of the hearing officer ordering that the employees at C K Homes be inducted into the State of Michigan classified service. See *AFSCME v Michigan Civil Service Commission*, Ingham County Circuit Court Nos. 90-66841-AA and 90-66864-AA. The State has now appealed that decision to the Michigan Court of Appeals. Ct. App. Nos. 170606, 170893.

After MERC denied the request for a rehearing and granted the stay, 1990 MERC Lab Op 491, the MDMH — but not Louisiana Homes — appealed to the Court of Appeals. On September 6, 1991, that court denied the MDMH's appeal. *AFSCME, Michigan Council 25 v Louisiana Homes*, 192 Mich App 187 (1991) (Pet App at 19a-31a). On November 17, 1992, the Michigan Supreme Court denied the MDMH's application for leave to appeal from that decision. *AFSCME, Michigan Council 25 v Louisiana Homes*, 440 Mich 879 (1992).

Faced with the obligation to enter into collective bargaining with the employees at Louisiana Homes, the MDMH filed a motion for reconsideration, asserting, for the first time since MERC's sua sponte consideration of state jurisdiction, that the jurisdiction of MERC and the Michigan courts over Louisiana Homes was purportedly preempted by the NLRA. The Michigan Supreme Court granted the motion to reconsider by remanding this extremely belated challenge to the Michigan Court of Appeals. *AFSCME, Michigan Council 25 v Louisiana Homes*, 441 Mich 883 (1992) (Pet App, at 17a-18a). After extensive briefing, the Court of Appeals denied the Department's belated challenge, concluding that MERC could assert jurisdiction because the Board had shown that it would decline jurisdiction over Louisiana Homes by its prior decisions in *C K Homes* and *Residential Systems*. *AFSCME, Michigan Council 25 v Louisiana Homes*, 203 Mich App 213 (1994) (on remand) (Pet App, at 2a-16a).

The MDMH then filed an application for leave to appeal to the Michigan Supreme Court, which was denied, _____ Mich _____ (July 12, 1994) (Pet App, at 1a). The Department then filed this petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I

THE DEPARTMENT LACKS STANDING TO ASSERT THE CLAIMS IT SEEKS TO MAKE IN THIS COURT.

The petitioner makes an extremely peculiar argument in this case. As a department of the State of Michigan, the petitioner

asserts that the jurisdiction of the National Labor Relations Board must be protected. But the one thing which is clear is that the MDMH has no interest in the jurisdiction of the Board. It is, in fact, the only party in this action over whom the Board absolutely can not assert jurisdiction. 29 USC 152(2).

In claiming an interest in protecting the jurisdiction of the Board, the MDMH can only be asserting the interests of another. While the MDMH does not make clear on whose behalf it advocates, presumably it asserts that the Board's jurisdiction over Louisiana Homes must somehow be protected. But, curiously enough, Louisiana Homes has never attempted to invoke that jurisdiction. In fact, Louisiana Homes has affirmatively concurred in the view that the MDMH is a joint employer with it, which, the Board has long held, automatically divests the Board of jurisdiction! See, e.g., *Lutheran Welfare Services of Illinois v NLRB*, 607 F 2d 777, 778 (CA 7 1979)(en banc); *NLRB v Parents and Friends of Specialized Living Center*, 879 F 2d 1442, 1449 (CA 7 1989) and cases cited therein.

Like a latter-day Don Quixote, the MDMH tilts at windmills on behalf of a hoped-for patron who does not seek its services. More prosaically, this means that the MDMH can not meet either the constitutional or prudential standing requirements set forth by this Court.

As this Court has stated, Article III requires that a party invoking the jurisdiction of a federal court set forth that it has suffered "an injury in fact" as a result of the claimed violation of federal law. *Lujan v Defenders of Wildlife*, _____ US _____, 112 S Ct 2130 (1992). As the MDMH has not and can not suffer an injury in fact because of any alleged diminution of the Board's jurisdiction, it fails to meet even this bare constitutional requirement for asserting the claims it makes here.

The MDMH even more clearly fails to meet the prudential requirements for standing established by this Court. *Valley Forge Christian College v Americans United for Separation of Church and State, Inc.*, 454 US 464 (1982); *Clark v Securities Industry Assoc*, 479 US 388 (1987). The MDMH is not an intended beneficiary of the Act in general or of Section 14(c) in particular.

Its interests are opposed to, not congruent with, the interests of the employees of the home. Its claims here are "more likely to frustrate rather than to further the statutory objectives." *Clark*, *supra*, 479 US at 397 n 12.

The MDMH seeks review not because it wants to vindicate any rights it has under the NLRA, but because it wants to frustrate the rights which the employees and AFSCME have won under state law. That, AFSCME submits, is not an interest sufficient for the MDMH's assertion of the claims it now raises. If knight errantry has no place in the courts, neither does the MDMH's petition.

II

MICHIGAN PROPERLY ASSERTED JURISDICTION IN A CASE WHERE THE NATIONAL LABOR RELATIONS BOARD HAD TWICE DECLINED JURISDICTION IN SIMILAR, IF NOT IDENTICAL, CIRCUMSTANCES.

In the Landrum-Griffin amendments to the National Labor Relations Act, Congress specifically sanctioned the Board's past practice of declining jurisdiction over a labor dispute,

> "... involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of [Board] jurisdiction ..." 29 USC 164(c)(1).

The same Congress also took steps to end the "no-man's land" between federal and state jurisdiction by providing that:

> "Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State ... from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." 29 USC 164(c)(2).

While the petitioner asserts repeatedly that Michigan has attempted to "usurp" the jurisdiction of the NLRB (See, e.g., Pet., at 16-17), a fair review of the decisions below shows that

Michigan rather scrupulously considered these statutory provisions, as well as the policy of the NLRA itself, before concluding that it could assert jurisdiction over this case.

As noted, MERC considered its jurisdiction *sua sponte*, concluding that it could assert jurisdiction because the NLRB Regional Director had twice refused to assert jurisdiction over "homes operating under the same type of contract which exists between the Employer and the Department in this case." *Louisiana Homes, Inc./MI DMH*, 1989 MERC Lab Op at 56 (Pet App at 44a-46a).

After all appeals on the merits were concluded, the Court of Appeals, on remand from the Michigan Supreme Court, likewise concluded that MERC could assert jurisdiction under Section 14(c) because the NLRB had twice refused jurisdiction over homes operating under circumstances virtually identical to those before MERC in this case:

> Because the DMH is the same governmental entity and Louisiana Homes is the same type of employer as was involved in each of these other cases, and because the control exercised by the DMH over the Louisiana Homes' direct care workers is governed by the same type of contract that existed in these other cases, we agree with the MERC that a sufficient showing has been made that the NLRB would similarly refuse to assert jurisdiction over the labor dispute in this case. *Michigan Council 25 v Louisiana Homes, Inc.*, 203 Mich App 213, 221 (1993) (Pet App at 13a-14a).

As if to stress its fealty to the preemptive power of federal labor law, the Court of Appeals concluded that its resolution of this issue "... stem[med] not from our interpretation of the NLRA, but from our application of the NLRB's own decisions under like circumstances." *Id.* (Pet App at 14a).

In asking this Court to review the decision by the Court of Appeals affirming MERC's jurisdiction, the petitioner does not claim that the prior cases at the Board differed in some important respect from the case at bar. There is, in particular, no claim that the contractual relationships or the MDMH's retained powers

differed between C K Homes and Residential Systems on the one hand and Louisiana Homes on the other. Rather, the petitioner asserts only that the courts of Michigan should be denied jurisdiction because "... the NLRB has never been so much as approached *in this case*..." (Pet. for Cert, at 27) (emphasis added).

This formalistic challenge is not in accord with this Court's repeated warnings that preemption should not be "... rigidly applied to cases where it could not be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca v Sipes,* 386 US 171, 179 (1967); *Farmer v Carpenters,* 430 US 290, 302 (1977). Even in the garden variety preemption case, this Court has never held that the Board must actually decline jurisdiction before the state could assert its judicial authority. *San Diego Building Trades v Garmon,* 359 US 236 (1959).

Under the command of Section 14(c) that the "no-man's land" between federal and state coverage of employers be eliminated,[4] the Court has even more clearly disavowed any rigid requirement that the matter be submitted to the Board before the state asserts its jurisdiction. *Radio & TV Local 1264 v Broadcast Service,* 380 US 255 (1965). In that case, the Court held that Alabama's jurisdiction to issue a restraining order against picketing a particular employer was preempted, but it did not do so on the basis that the matter had to be submitted to the Board first. Instead, it held that a state court, before assuming jurisdiction under Section 14(c), need only make a "... proper determination

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[4]In declining jurisdiction over employers controlled by an exempt entity, the Board has suggested that it is acting pursuant to the discretionary power given it by 29 USC 164. See *National Transportation Service, Inc.* 240 NLRB 565, 565-566 (1979); *St. Jude Industrial Park,* 265 NLRB 597, 599-600 (1982). In subsequent cases, some Board members have suggested that the Board is enforcing the statutory limits on its jurisdiction when it declines jurisdiction over such entities. *Res-Care,* 280 NLRB 670, 675 (1986). If anything, however, the need for eliminating the no-man's land is stronger when the Board respects the limits of its statutory jurisdiction than when it exercises its discretionary power to refuse jurisdiction.

of whether the case is actually one of those which the Board *will decline to hear." Id.,* 380 US at 256 (emphasis added).

This rule is reenforced by the very cases upon which the petitioner so heavily relies. See *Longshoremen v Davis,* 476 US 380 (1986); and *Marine Engineers v Interlake Co.,* 370 US 173 (1962). In *Davis,* the Court held that a state court, before assuming jurisdiction, must determine whether the party asserting preemption has "advance[d] an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board". *Id.,* 476 US at 395. In *Marine Engineers,* the Court held that a state court could not assume jurisdiction in the face of a Board decision stating that it would assume jurisdiction "... [i]n the absence of a showing that this position [that is, the Board's decision] had been authoritatively rejected by the courts or abandoned by the Labor Board itself..." *Id.,* 370 US at 184. In both, the Court plainly held that state courts could conduct an independent review of federal law to determine whether the Board would actually assert jurisdiction.

As the Michigan Court of Appeals quite properly held, there is no need for "fruitless submissions" to the Board where the party asserting state jurisdiction can "... show on the basis of 'rule of decision or by published rules' that the NLRB has or would have declined jurisdiction." *AFSCME, Michigan Council 25 v Louisiana Homes, supra,* 203 Mich App at 220, citing *Russell v Electrical Workers Local 569,* 64 Cal 2d 22, 25, 48 Cal Reptr 702, 409 P 2d 926 (1966) (Pet App, at 11a-12a).

In this case, the purported threat to federal jurisdiction is not only insubstantial — it is speculative and formalistic at best. Put differently, there is no reason for this Court to intervene to protect the Board's jurisdiction when the Board itself has twice made clear that it has not and can not assert that jurisdiction.

III

THERE IS NEITHER AN INCREASING NOR A SIGNIFICANT CONFLICT WHICH THIS COURT NEEDS TO RESOLVE.

In its petition, the MDMH asserts that this Court should grant the writ to resolve what it styles "the increasing conflicts among state courts as to whether they or the NLRB may decide jurisdictional questions in the first instance" (Pet., at 32). The petitioner then claims that the conflict is manifest in decisions from Nevada and California on the one hand and from Louisiana and Pennsylvania on the other hand. See *International Union of Operating Engineers, Local No. 3, v Bing Construction Co. of Nevada,* 90 Nev 183, 521 P 2d 1231 (1974); *Russell v Electrical Workers Local 569, supra*; *Evangeline Downs v Pari-Mutuel Clerk's Union of Louisiana,* 119 So. 2d 358 (1966); *Stryjewski v Local Union No. 830,* 426 Pa 513, 233 A2d 264 (1967).

Unless the language is to be stretched beyond recognition, however, these cases do not show an "increasing" conflict among state courts over any question. In an effort to show a conflict, the petitioner has been forced to resort to cases which are two to three decades old. If a conflict existed in these cases, it might be of passing historic interest, but it would hardly qualify as a burning issue of federal law which should command this Court's attention.

There is, moreover, a question whether the conflict seen by petitioner actually exists at all. In different factual circumstances, each authority cited by petitioner holds that the state may only assert its jurisdiction when it is clear that the Board will not assert jurisdiction. None concerns public employers excluded from the Act's jurisdiction; none deals with questions of joint employment; and none involves cases where the Board had declined jurisdiction over "virtually identical" cases before the controversy was presented to the state forum.

In reality, only one jurisdiction claims nominal adherence to the rule proposed by petitioner,[5] and several other decisions,[6] not cited by petitioner, generally support the position taken by the Michigan Court of Appeals in this case. There is no conflict, increasing or otherwise, which requires this Court's attention.

IV

THIS CASE PRESENTS NO THREAT TO A UNIFORM NATIONAL LABOR POLICY.

The petitioner asserts, finally, that this case will have a "profound effect on the direction of labor law in the State of Michigan." (Pet., at 49). Insofar as the petitioner claims that this case will affect the development of the state law of Michigan, AFSCME agrees. Insofar as the petitioner claims a "profound effect" on the development of federal labor policy, however, AFSCME submits that it is plainly wrong.

Consistent with a long line of federal cases, the Board has determined that it will not assert jurisdiction over joint employers where one of the joint employers is an organization exempt from the coverage of the Act. *Lutheran Welfare Services of Illinois v NLRB, 607, supra*; *NLRB v Parents and Friends of Specialized Living Center, supra.* Twice, the Regional Director has applied those principles to decline jurisdiction over cases virtually identical to the one at bar. *C K Homes, supra; Residential Systems, supra.*

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[5]See *Evangeline Downs, supra,* 191 So 2d at 361. As petitioner acknowledges, Pennsylvania once adhered to this rule, but this has been undercut by a later decision in that state. See *Stryjewski, supra*; *In the Matter of Employees of Student Services, Inc.*, 49 Pa Comm Ct 126, 435 A 2d 297 (1981).

[6]See *Operation and Maintenance Service, Inc. v Labor Relations Comm, et. al,,* 405 Mass 214, 539 NE2d 1030 (1989) and *Jackson County Public Hospital v Public Employment Relations Board,* 280 NW 2d 426 (Iowa Sup Ct 1979), not cited by petitioner, but generally supportive of the decision rendered by the Michigan Court of Appeals in this case.

In the event any party subject to the Act felt the Regional Director's decision were no longer valid — either because of changes in the contractual relationship or in the governing law — that party could again seek to invoke Board jurisdiction. The union could file a petition pursuant to Section 9(c)(1)(A), 29 USC 159(c)(1)(A); Louisiana Homes, or any other group home, could file a petition pursuant to Section 9(c)(1)(B), 29 USC 159(c)(1)(B); and any employee could file a charge pursuant to Section 8(a), 29 USC 158(a). That no one has done so is in itself confirmation of the Regional Director's decisions not to assert jurisdiction over such homes.

It speaks volumes, as well, about the MDMH's fanciful claims here. Where any error can be rectified or any change in law or facts accounted for by new filings at the Board by any of the parties subject to the Act, it is certainly a vast exaggeration to claim that this decision will cast a pall over the future development of federal jurisdiction itself.

Beyond being fanciful, however, the MDMH's claim is in reality quite pernicious. It stands the purposes of the NLRA in general and of Section 14(c) in particular on their head. Clearly, the NLRA reserved to the states the power to regulate their own public sector labor law. Just as clearly, Section 14(c) made clear that the states could regulate private employers where the Board would not assert jurisdiction.[7] Michigan has now done that — but the MDMH seeks to undo it by requiring that six years of litigation be thrown out because someone did not go through the fruitless formality of first filing a petition at the NLRB.

As there is no warrant in Section 14(c) or anywhere else in the Act for such a requirement, AFSCME requests that this Court deny the MDMH's petition forthwith — so that Michigan can enforce its decisions and so that the employees can enjoy the rights so long denied them.

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[7]As a practical matter, MERC is the only body which can assert jurisdiction over both of the joint employers, pursuant to the state's Labor Mediation Act, MCL 423.1, et. seq., and the Public Employment Relations Act, MCL 423.201, et. seq.

RELIEF SOUGHT

The appellee, Michigan Council 25 of the American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO requests that this Court deny the writ of certiorari.

Respectfully submitted,

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Decision and Order

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

C. K. HOMES, INCORPORATED[1]
Employer-Petitioner,

AND

Case No. 7-RM-1275

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO
Union.

APPEARANCES:

PAUL M. KARA, ESQ., of Muskegon,
Michigan, for the Employer-Petitioner

GEORGE B. WASHINGTON, ESQ., of
Detroit, Michigan, for the Union

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:[2]

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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[1]The name of the Employer appears as amended at the hearing.

[2]Both the Employer and the Union have filed briefs which have been duly considered.

2. The labor organization involved claims to represent certain employees of the Employer.

3. The Employer is not engaged in commerce within the meaning of the Act and no question concerning representation of employees of the Employer exists within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act for the following reason:

The Employer-Petitioner alleges that the Board has jurisdiction, while the Union argues that it does not.[3]

The Employer is a nonprofit Michigan corporation which operates three homes for mentally disabled adults within the city of Muskegon, Michigan. Each home provides all services necessary for the daily needs of up to six residents. Under the Michigan Mental Health Code, the care of the residents is the responsibility of the State of Michigan. The Michigan Department of Mental Health, through its Muskegon Regional Center, contracts yearly with the Employer to furnish these services to these mentally disabled adults, sometimes referred to as recipients. A separate contract covers each home. Muskegon Regional Center similarly contracts with 52 other homes within its geographic area for the providing of adult foster care to mentally disabled individuals, children and adults, who are the responsibility of the State of Michigan. The 55 homes are of two types — family homes and group homes. Group homes, in turn, are classified as either community living facilities (CLFs) or alternative intermediate services homes (AIS homes). The more severely disabled individuals reside in the AIS homes, where the staff to resident ratio is higher than that in CLFs. The Employer's three facilities are

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[3] I reject the Employer's argument that the Union, by certain positions it has taken previously before the Michigan Employment Relations Commission (MERC), should be estopped from denying that the NLRB has jurisdiction. A ruling as to whether there is statutory jurisdiction by the Board over a matter is a factual and legal question to be decided by the Board based upon evidence elicited at a hearing and is not properly based upon the prior positions by the parties.

group homes. The Employer's facility located on Hansen St. is an AIS home and the other two are CLFs.

All residents at the three homes were placed there by the Muskegon Regional Center. No residents are housed at the Employer's facilities except those so placed by the Muskegon Regional Center. The premises in which the Employer operates are leased by the State of Michigan and the equipment inside was purchased with funds from the State of Michigan. If a contract is cancelled or not renewed, possession of the equipment reverts to the state. A case manager employed by the State of Michigan at Muskegon Regional Center monitors the care given by the Employer to each resident which must accord with the individualized health care plans developed by a health care team employed by the Muskegon Regional Center. Nurses and other health care professionals, as needed, such as physical and occupational therapists, comprise the health care team and are likewise employed by the State at the Muskegon Regional Center. However, hospital care and physicians are independently provided. The Regional Center's case manager visits the facilities weekly to review the health care plans and the patient charts which the contract between Muskegon Regional Center and the Employer provides must be kept available for inspection.

Approximately 31 training aides are employed by the Employer: 10 or 11 at the Brooks home, 7 at the Broadway home and 13 or 14 at the Hansen home, an AIS home. Each home also employs a manager. The training aides provide direct care to the residents; they assist them with dressing and grooming tasks as necessary; they clean the facility, and prepare the meals. Aides are employed 24 hours a day seven days a week, and in sufficient numbers to meet state policy requirements. The Employer hires the aides, who the State of Michigan requires must be at least 18 years of age and of good moral character. The state requires that all newly hired aides must successfully conclude a six week training program provided by the state or alternatively, they may

take tests on the subjects taught. The tests are graded by Muskegon Regional Center.

Both AIS homes and CLFs, including those run by the Employer, are funded exclusively by federal and state monies. AIS homes receive 56% of their funds from the federal Medicaid program through the State of Michigan, and the State of Michigan provides the remainder. CLFs are funded 75% by the State of Michigan and the remainder by supplemental security income (SSI) received from the federal government by the residents, who turn their checks over to the Employer.

Decisions about wages paid specific employees are made by the Employer, but the total annual labor costs for the homes is set forth in the annual budget which is part of its contract with Muskegon Regional Center. The budget is prepared at the beginning of each State of Michigan fiscal year by Muskegon Regional Center, based upon previous cost reports from the facility and Department of Mental Health budget guidelines and directives. It is then sent to the Employer, as a part of the contract, for acceptance. Before Muskegon Regional Center may enter into the contract, it must be approved by an administrative board appointed by the Governor of the State of Michigan. Specified in the budget are yearly amounts to be spent on the following categories: personnel and home managers, property costs, operational costs (such as utilities, insurance and transportation), equipment, administration, and resident allowance. Funds cannot be transferred amongst these categories without permission from Muskegon Regional Center. The Employer submits a quarterly accounting of its expenditures to Muskegon Regional Center, which utilizes these reports to monitor the homes' spending. It also submits to Muskegon Regional Center a monthly occupancy report. If the amount spent by the Employer in any of the six budgeted items is less than the budgeted sum, the excess must be returned to the State of Michigan. If more is expended, the contract is amended so that the budgeted amount equals the actual amount spent by the Employer.

As determined by Muskegon Regional Center, the personnel cost budgeted to the Employer by the state is computed as average hourly wage rate plus 24% for taxes and fringe benefits multiplied by a number of full-time employees. Another ½% of that total is added in for staff meetings. The State of Michigan adjusts the average hourly wage rate from time to time by legislative appropriation. When such an adjustment is made, the state issues instructions to the Muskegon Regional Center as to how the total amount appropriated is to be divided among the various AIS homes and CLFs. Contracts between Muskegon Regional Center and the health care providers, such as the Employer, are then renegotiated pursuant to the instructions with a new average hourly wage and total personnel cost.

The contract between Muskegon Regional Center and the Employer provides that a number of conditions must be met by the Employer for the contract to continue in effect. Thus, the Employer agrees to be bound by decision of the Office of Recipient Rights, a state agency responsible for adjudicating any complaints filed with it regarding resident care. When such a complaint is filed, the Office of Recipient Rights and the Muskegon Regional Center investigate it and then decide whether any or what sanctions should be imposed. A disciplinary manual used by the Office of Recipient Rights specifies what sanctions are to be imposed for various types of aide misconduct. When, in any case, the Office of Recipient Rights notifies the Employer of its findings, the Employer must take the remedial actions set forth by the former. The only evidence in the record of sanctions being taken against the Employer's employees were pursuant and identical to recommendations made by the Office of Recipient Rights. If the Employer does not take the recommended action, the Muskegon Regional Center may cancel the contract or place the affected resident elsewhere. Where there is evidence of abuse of a resident who is a minor, it must be reported to the Michigan Department of Social Services.

Entities are exempt political subdivisions of a State under Section 2(2) of the Act if they are either, (1) created directly by a State so as to constitute departments or administrative arms of the government, or (2) are administered by individuals who are responsible to public officials or to the general electorate. *NLRB v The Natural Gas Utility District of Hawkins County, Tennessee,* 402 U.S. 600 (1971). Here, there is no evidence that the Employer's owners, directors, or officials are directly responsible to the electorate or to public officials. That it occupies state leased property and receives funds and other assistance from the state, does not render the Employer an exempt entity. *Morristown-Hamblen Hospital Association,* 226 NLRB 76 (1976). Accordingly, since the Employer is not created directly by the State of Michigan, it is not a political subdivision of that state. The Employer, therefore, is not exempt under Section 2(2) of the Act, and the Board has the statutory power to assert jurisdiction over its operations. Compare *Northampton Center for Children and Adults, Inc.,* 257 NLRB 890 (1981).

In the case herein, the State of Michigan has delegated to facilities such as the Employer's the responsibility for the day-to-day care of the residents, which are the responsibility of the state. The State of Michigan retains control of the final product, i.e., the care delivered to the residents, but decisions as to who is to give the care and how that care is to be given are somewhat at the discretion of the Employer. Thus, for example, the Employer may decide on its own, whether and to what extent to use part-time employees, to set the wage rates of the various classes of employees, and what fringe benefits to grant to the employees, such as health insurance and pension plans. The Employer recruits and hires its own employees, although it is obligated to consider preference to laid off State employees, but it may not hire active State employees. The Employer is the entity which imposes discipline and transfers, lays off employees and signs their paychecks. The Employer carries workers compensation insurance on the employees. It maintains its own grievance procedure culminating with its own Board of Directors. The Employer has

established its own yearly evaluation system for aides in which the State of Michigan is not involved.

However, the total amount in labor costs the Employer can amass is controlled by the yearly budget imposed upon it by the State and it cannot exceed that total without State approval. The State periodically monitors the Employer's wage expenditures by reviewing the Employer's expense reports which are submitted to it. The Employer receives no funds except from the State of Michigan and the federal Medicaid program. While the Employer may decide which health and pension programs to offer to employees, it cannot spend more than the specified budgeted amount for fringe benefits and thus the State has ultimate control of the amount expended on fringe benefits as well as wages. Though the Employer does its own hiring, all employees must successfully complete the State's six week training session held at Muskegon Regional Center, and it is the Center which certifies newly hired employees as competent to do the work of the aides. The only record of discipline being issued by the Employer was pursuant to Office of Recipient Rights complaints and investigations. Two employees on different occasions were terminated after the Office of Recipient Rights reported the conclusions of its investigations. The Employer has its own personnel policies which are not reviewed by the State, but the contract between the Employer and the State requires that the policies be framed in such a way so that sanctions which the Office of Recipient Rights orders after its investigations will eventuate. The Employer may take disciplinary action more severe than that ordered after investigation by the Office of Recipient Rights, but it never has done so, except to suspend the ultimately terminated employees pending the Office of Recipient Rights investigation. The contract between the Employer and Muskegon Regional Center requires that the employees have access to a grievance procedure, and the one in use at the Employer's facilities is identical to the State of Michigan grievance procedure, except that it culminates with the Employer's Board of Directors rather than with a State of Michigan official. Muskegon Regional Center issues to the Em-

ployer a comprehensive manual consisting of various operating procedures, ranging from instructions for conducting a fire drill to directives on how aides are to address residents. Most of the 118 procedures and directives are mandated for implementation by the Employer, though the few that pertain to personnel matters are optional rather than mandatory.

In cases where the Board must ascertain whether jurisdiction should be asserted over an entity which appears to maintain close ties to an exempt government entity, the *National Transportation* test is used. *D.T. Watson Home for Crippled Children*, 242 NLRB 1328 (1979). Although the Employer retains discretion over such day-to-day details as shift hours and distribution of wages, the practical effect of the State control is such that the Employer functions as an "administrative arm" of the State in providing residential services for developmentally disabled adults. *The New York Institute for the Education of the Blind*, 254 NLRB 664 (1981). The control exercised upon the day-to-day operations of the Employer by the State of Michigan by virtue of its funding of the Employer and its monitoring of the Employer's expenditures and the quality of the care delivered (via the periodic expense reports and Muskegon Regional Center's case management system) is substantial. So is the operational control by the integration of the manual into the homes' operational system. The Employer has no residents other than those that the State refers, and it has no independent authority to reject a referral or release a resident. Compare *Herbert Lipton Community Mental Health Center*, 258 NLRB 38 (1981), which had an existence of its own. The homes it operates are owned by the state, as also are their furnishings and equipment. Compare *Id.* The practical effect of the operational, fiscal and disciplinary control exercised over the Employer by the State of Michigan and especially the Muskegon Regional Center, a governmental agency, is such that meaningful collective bargaining about wages and other terms and conditions of employment would not be possible. *Target, Inc.*, 263 NLRB 781 (1982); Cf. *Youth Guidance Center*, 263 NLRB 1330 (1982). The only matters on

which the Employer has independent discretion are how the total wage amount is to be allocated among the employees, the mix of full-time employees to part-time employees, the type (not cost) of fringe benefits offered, and the shift hours. Though these are terms and conditions of employment about which bargaining could take place, they are not sufficient to constitute a meaningful collective bargaining relationship, in view of the pervasive State of Michigan control over all other aspects of the Employer's operations and personnel. The control exercised by the State of Michigan over the Employer is beyond mere licensing regulations which also affect other health care institutions. *Madison County Mental Health Center, Inc.*, 253 NLRB 258 (1980). While there is no evidence that the Employer was created by the State, it is clear that the Employer has no life independent of its symbiotic ties to the State of Michigan. The State has delegated its responsibility for these developmentally disabled individuals to the Employer and yet has retained substantial control over how the service is to be delivered and its labor costs.

Thus, the Employer may be considered to be tantamount to an administrative arm of the government and not within the definition of Section 2(2) of the Act. In addition, the control possessed and exercised over the Employer's operations by the State of Michigan makes meaningful collective bargaining impossible. *Target, Inc.*, above; Cf. *Wordsworth Academy*, 262 NLRB 438 (1982); *The Krebs School Foundation*, 243 NLRB 514 (1979). Accordingly, as the Board does not have jurisdiction over the Employer, I shall dismiss the petition.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.[4]

Dated at Detroit, Michigan, this 14th day of February, 1986.

(SEAL)

/s/ BERNARD GOTTFRIED

Bernard Gottfried, Regional Director
National Labor Relations Board
Seventh Region
Patrick V. McNamara Federal Building
Room 300, 477 Michigan Avenue
Detroit, Michigan 48226

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[4]Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW, Washington, DC 20570. This request must be received by the Board in Washington by February 27, 1986.

Decision and Order

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

RESIDENTIAL SYSTEMS COMPANY[1]
Employer

AND

Case No. 7-RC-18529

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)[1]
Petitioner

APPEARANCES:

Gregory J. Bator, Esq., of Birmingham, Michigan, for the Employer
Susan Susselman, International Representative, of Detroit Michigan, for the Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:[2]

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[1]The names of the parties appear as corrected at the hearing.

[2]Both the Employer and the Petitioner have filed briefs which have been duly considered.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The labor organization involved claims to represent certain employees of the Employer.

3. The Employer is not engaged in commerce within the meaning of the Act and no question concerning representation of employees of the Employer exists within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act for the reason discussed below.

Petitioner seeks to represent a unit of direct care workers at various facilities operated by the Employer. The Employer, contrary to the Petitioner, contends that the Board does not have jurisdiction over it because of the nature of its relationship with the State of Michigan.[3]

I

The Employer is a non-profit corporation which provides residential care for developmentally disabled individuals at 14 locations in the State of Michigan. Of these 14 locations, two are designated as Supported Independence Program (SIP) homes, a term applied to homes for persons functioning at a higher development level and therefore in need of fewer supportive services. The Employer's operations are funded entirely from state and federal monies.

All residents were placed in the Employer's home by and are former residents of Macomb Oakland Regional Center (MORC), a subdivision of the Michigan State Department of Mental Health (DMH). Various persons described as "direct care workers" are employed at these homes to provide assistance to residents in daily living tasks and to ensure that basic needs of

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[3]In view of my decision below that the Board has no jurisdiction in the instant case, I make no decision as to other issues relating to jurisdiction, the proper scope of the unit, and placement of substitute employees.

residents, such as food, shelter and medical care, are met. Residents remain the responsibility of DMH; MORC retains the right to remove and transfer residents from any home. In the event of an unauthorized absence of a resident the Employer is required to notify MORC.[4]

The Employer contracts with MORC to provide services to the residents housed at its homes. Each home is governed by a separate standardized contract which the Employer asserts is presented to it on a take-it-or-leave-it basis by MORC and whose terms are not subject to negotiation. Such contracts specifically incorporate by reference existing and future policies, procedures, rules and regulations of the DMH which specify in minute detail the care to be given residents.

Each contract includes an annual budget for the facility with dollar amounts designated for categories of expenses as well as specific line items within said categories. Schedule A on the budget encompasses personnel expenses including salaries and fringe benefits. The dollar figure is determined thusly: MORC determines the number of staff persons required, based on the needs of the residents, and describes this number in terms of Full-Time-Equivalent positions. It then multiplies this number by 40 hours and then by a set hourly rate which it has previously determined to be sufficient to cover all direct care staffing needs, including overtime, vacation, taxes and various other required employee payments. The resulting dollar amount is the total amount available to the Employer for all personnel costs at the home in question, excluding training, which is a separate line item dollar amount under Schedule A. Each year the dollar hourly

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[4]The impetus for the creation of a community residential placement program for the developmentally disabled came from a lawsuit filed on behalf of institutionalized individuals at Plymouth Center in Plymouth, Michigan. A consent judgment entered in 1979 became the model for the deinstitutionalization of developmentally disabled persons and the placement of such individuals in the "least restrictive setting." Pursuant to that judgment the DMH developed various programs, regulations, and guidelines applicable throughout the State.

figure is changed based on the percentage change of the budget of the DMH.

Schedule A funds cannot be used for any other purpose except those designated and funds from other schedules cannot be transferred to Schedule A to make up deficiencies, with the exception that administration expenses, set at a flat 9.9 percent of the total budget, can be so transferred. Training funds can be used only for training and unused monies cannot be employed for any other personnel costs but must be returned to the State. Similarly, unused Schedule A funds must be returned to the State. In addition each contract provides that any budget item may be increased or decreased pursuant to legislative appropriation, executive order or changes in federal benefit levels.

The contract between MORC and each home calls for the home to maintain a staff complement in accordance with the requirements set by MORC. It further requires that one person with familiarity and capability of implementing emergency procedures be on duty at all times that residents are at the home. Staffing patterns are generally determined by staff to resident ratios set by MORC. Guidelines provide that all changes in the number of employees on duty must be approved by MORC. While the Employer may request funds for enhanced staffing, such approval must be authorized by MORC in writing and apparently is rarely granted. Each home submits quarterly reports detailing the staffing hours provided during that period; according to testimony if a home does not provide 90 percent of the required staffing hours during such time, MORC is obligated to withhold funds.

Each group home contract specifies that the Employer, rather than MORC, is the sole Employer of the employees at the location covered by the contract.

MORC sets minimum age and health standards for the hiring of new employees as well as more subjective personality requirements such as the ability to understand behavior and desire

to help. The Employer is directed to consider such characteristics as flexibility, tolerance and warmth. The Employer agrees by contract to make pre-employment inquiries about applicants' educational background and work history and to verify references and credentials prior to hiring. MORC guidelines require that the Employer specifically request written personal references and that it make contact with at least three such references. The non-SIP contracts also require that the Employer give consideration to employees on lay-off from DMH, a requirement that the Employer interprets as requiring preference in hiring to such employees. The Employer is not permitted to employ current employees of the DMH as an agent, representative or other person capable of acting on its behalf. MORC guidelines further provide that additional or more specific requirements may be imposed by MORC.

As a specific term of the Employer's contracts, all direct care workers are required as a condition of employment to participate in in-service training provided by MORC. Employees are required to pass tests administered by MORC and if they do not pass they are to be terminated. The amount and content of training is determined solely by MORC, which may also waive such training.

The non-SIP homes are required to maintain and implement personnel policies that conform to state and federal laws. Guidelines issued by MORC call for the Employer personnel policies to include job descriptions and have an "authorized procedure, consistent with due process, for suspension and/or dismissal of an employee for cause." Certain Employer homes receiving federal funding are subject to additional regulations. Guidelines for such homes set out greater specificity, requiring personnel policies to contain specific provisions such as job descriptions which contain salaries, and conditions of employment. SIP homes are also required by their contracts to meet a greater standard of specificity; those contracts require the Employer to maintain personnel policies which include procedures for hiring and termination of

staff, staff disciplinary procedures, pay schedules, listing of fringe benefits and an employee evaluation procedure.

Certain complaints of employee conduct relating to the violation of the residents' rights are subject to investigation by the Office of Recipient Rights (ORR), created by the State for the protection of those for whom it is responsible. The ORR is empowered to investigate such complaints and makes appropriate recommendations to the Employer. According to testimony the recommendation of the ORR is generally followed because failure to do so puts its contract at risk.

II

The test to determine whether the Board should assert jurisdiction over an Employer claiming lack of jurisdiction because of its connection with an exempt government entity is one, whether the employer meets the definition of employer in Section 2(2) of the Act and two, if so, whether the employer is able to engage in "effective" or "meaningful" bargaining with a labor organization. *National Transportation Services,* 240 NLRB 565 (1979). In analyzing an employer's ability to engage in effective bargaining the Board examines both the control over employee terms and conditions of employment retained by the employer as well as the scope and degree of control exercised by the exempt entity over the employer's labor relations. *Res-Care, Inc.*, 280 NLRB No. 78 (slip op. at 8) (June 24, 1986). It is the Board's view that there exists a group of basic bargaining subjects and that if the employer retains control over such subjects meaningful bargaining is possible and contrariwise if the employer does not have the ultimate authority with respect to such subjects meaningful bargaining is not possible. These subjects relate to bargaining about wages and benefits. The Board stated in *Res-Care* that, "if an employer does not have the final say on the entire package of employee compensation . . . meaningful bargaining is not possible," reasoning that the employer's ability to have the "final, practical say" regarding wages and benefits and the union's

concurrent ability to affect the employer by economic action is fundamental to the concept of meaningful bargaining. *Id* at 13.

In the instant case it is clear that the State of Michigan, through various agencies, exercises substantial control over the labor relations of the Employer as it applies to employee compensation. The monies available for salaries and benefits are determined by MORC through a unilaterally imposed and unvarying formula and are specified as a line item in each home's budget. These funds are subject to unilateral modification by the State through legislative or executive action; the funds are further subject to reduction with changes in federal benefit levels. The Employer is required to staff the homes in accordance with the number of positions allocated by MORC under the express conditions set by MORC. The Employer's lack of control over compensation is made manifest by the staffing requirements imposed by MORC which thus serve to further narrow the range of the Employer's ability to make decisions as to compensation. Combined with other extensive limitations governing such matters as disciplinary procedures, job descriptions and content, evaluation procedures, hiring and training of employees, covering almost the entire panoply of the employer-employee relationship, it appears that the "corridor of bargaining subjects" contemplated by *Res-Care* has been narrowed to an extent that meaningful bargaining is not possible. *Res-Care, Inc., supra, Target, Inc.*, 263 NLRB 781 (1982).

As in *Res-Care*, the Employer's budget, including monies allocated for salaries and benefits, is the basis for the funding received from MORC. This is contrasted with the situation present in *Long Stretch Youth Home, Inc.*, 280 NLRB No. 79 (June 24, 1986), cited by the Petitioner in its brief, in which the Board in finding jurisdiction over an employer which contracted with an exempt entity relied, in part, on the absence of a necessary connection between funding and wage and benefit levels, *i.e.*, the state's funding was not directly tied to proposed expenditures for wages and benefits, rejecting the argument that a

governmental entity controls labor relations by its limitations on the employer's total budget. *Id.*at 13, n. 14. Moreover, in the instant case, it must be noted that the monies allocated to salaries and benefits were unilaterally determined by MORC rather than being approved after proposal and submission by the Employer, such as occurred in *Columbus Area Community Mental Health Center, Inc.*, 286 NLRB No. 130 (November 30, 1987). Finally, as in *Res-Care*, and unlike the situation in *Columbus Area Community Mental Health Center*, there is a line item in the budget which limits the monies available for wages and benefits.[5]

Based on the foregoing discussion I conclude that meaningful bargaining by this Employer is not possible because of the extensive control over its labor relations by the State of Michigan. The Board therefore will not assert jurisdiction over the Employer. Accordingly I shall dismiss the petition.

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[5]*ARA Services*, 283 NLRB No. 89 (April 10, 1987), cited by the Petitioner, involved a situation in which there was no line-by-line budgeting with respect to employee compensation, no limits or controls of expenditures and no retention of control by the exempt entity. Similarly, *Rustman Bus Co.*, 282 NLRB No. 25 (November 14, 1986), cited by the Petitioner, involved an exempt employer with minimal control over the alleged employer. The situation herein is distinguished by the substantial control exercised by the exempt entity especially over compensation.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.[6]

Dated at Detroit, Michigan, this 7th day of April, 1988.

(SEAL)

/s/ BERNARD GOTTFRIED

Bernard Gottfried, Regional Director
National Labor Relations Board
Seventh Region
Patrick V. McNamara Federal Building
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Detroit, Michigan 48226

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[6]Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 21, 1988.

Delayed Motion for Rehearing

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In The Matter Of:

LOUISIANA HOMES, INC. AND
STATE OF MICHIGAN, DEPARTMENT
OF MENTAL HEALTH,
Employer,

CASE NO. R 88 A-38 &
R 88 C-112

AND

MICHIGAN COUNCIL 25, AMERICAN
FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, (AFSCME),
Petitioner.

DELAYED MOTION FOR REHEARING AND RECONSIDERATION

The Department of mental Health moves the Employment Relations Commission for Rehearing and Reconsideration under Mich Adm Code Rule 423.468 of its determination that the Department of Mental Health, State of Michigan, was a joint employer of direct care workers employed by Louisiana Homes, Inc, for the following reasons:

1. On January 27, 1989, the Employment Relations Commission issued its decision ordering an election among direct care workers employed by Louisiana Homes, Inc, and naming the Department of Mental Health, State of Michigan as joint employer.

2. The Employment Relations Commission's decision that the Department of Mental Health is a joint employer of the direct care workers raises important constitutional issues under 1963 Const, art 11, § 5. The decision exceeds the Employment Rela-

tions Board's authority and threatens to create a class of state employees not contemplated by the Michigan Constitution.

3. Petitioner, Michigan Council 25, American Federation of State, County and Municipal Employees has taken the position before a Michigan Civil Service Commission hearing officer that the direct care workers employed by C.K. Homes under circumstances similar to this case are state classified employees. This position is contrary to the reasoning of the Employment Relations Commission which found that the direct care workers employed by Louisiana Homes are not state classified employees.

4. The Civil Service hearing officer has not issued a decision as to whether direct care employees of C.K. Homes are state classified employees.

5. If employees of C.K. Homes are determined to be state classified employees, then employees of Louisiana Homes, Inc, may also be state classified employees. If so, the Employment Relations commission has no jurisdiction over the employees.

6. Moreover, the Administrative Law Judge and Employment Relations Commission's decision improperly conflates the Department of Mental Health's two separate roles as contractor and regulator in determining the Department of Mental Health is a joint employer. The stipulation entered into by Louisiana Homes, Inc, and Michigan Council 25, AFSCME cannot bind the Department of Mental Health. A fuller development of the facts is necessary.

7. An accompanying brief supports this motion.

Respectfully submitted,

FRANK J. KELLEY
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Dated: April 19, 1989
LO-MOT

Brief in Support of Delayed Motion

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In The Matter Of:

LOUISIANA HOMES, INC. AND
STATE OF MICHIGAN, DEPARTMENT
OF MENTAL HEALTH
Employer,

CASE NO. R 88 A-38 &
R 88 C-112

AND

MICHIGAN COUNCIL 25, AMERICAN
FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, (AFSCME),
Petitioner

BRIEF IN SUPPORT OF
DELAYED MOTION FOR
REHEARING AND RECONSIDERATION

INTRODUCTION

This case is one in a series of attempts by Petitioner American Federation of State, County and Municipal Employees ("AFSCME"), to force the Michigan Civil Service Commission to declare that direct care workers employed by contractors to the Michigan Department of Mental Health are state classified employees. In another very similar situation involving C.K. Homes, AFSCME first went to the National Labor Relations Board in a successful attempt to establish precedent that these were state employees. AFSCME then started proceedings before the Michigan Civil Service Commission to have the employees declared state classified employees. The hearing officer hearing the case has not issued a decision. AFSCME also instituted this case in a similar attempt to avoid the Michigan Civil Service Commission.

Brief in Support of Delayed Motion

The Employment Relations Commission heard this case and ruled that the Department of Mental Health was a joint employer of the direct care employees of Louisiana Homes, Inc. In doing so, the Administrative Law Judge and the Employment Relations Commission relied only on evidence introduced by nonadversarial parties. In fact, the parties stipulated that the Department of Mental Health was a joint employer.

The Department of Mental Health, after initially relying on its rights, now seeks a rehearing to present new evidence and to demonstrate how it is not a joint employer. To illustrate the relevant information not introduced in this case, the Department of Mental Health will cite to evidence introduced in the C.K. Homes Civil Service hearing to which AFSCME is a party. The information demonstrates that the Department of Mental Health properly exercises two separate roles: that of contractor and of regulator. These two roles do not make the Department of Mental Health a joint employer. Under the Employment Relations commission decision, any Department which freely contracts with a party and then regulates the contractor will be a joint employer.

Additionally, the Employment Relations Commission decision threatens to create a third class of state employees not contemplated by the Michigan Constitution. For these reasons, the Department of Mental Health requests rehearing and reconsideration in the matter of Louisiana Homes, Cases No. R 88 A-38 and R 88 C-112.

STATEMENT OF FACTS

The Department of Mental Health contracts with Residential Care Alternatives ("RCA"). RCA then contracted with Louisiana Homes.

Motion to Intervene

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In The Matter Of:

LOUISIANA HOMES, INC. AND
STATE OF MICHIGAN, DEPARTMENT
OF MENTAL HEALTH
Employer,

CASE NO. R 88 A-38 &
R 88 C-112

AND

MICHIGAN COUNCIL 25, AMERICAN
FEDERATION OF STAT , COUNTY AND
MUNICIPAL EMPLOYEES, (AFSCME),
Petitioner

MOTION TO INTERVENE AND
TO DISMISS FOR LACK OF JURISDICTION

NOW COME the Michigan Civil Service Commission and the Michigan Department of Civil Service, by and through its attorneys, FRANK J. KELLEY, Attorney General of the State of Michigan, and Deborah Anne Devine and Treva Robertson Truesdale, Assistant Attorneys General, petitioning to intervene in the captioned proceedings for the limited purpose of contesting the jurisdiction and authority of the Michigan Employment Relations Commission (hereafter "MERC") to determine various issues that are constitutionally delegated to the Civil Service Commission pursuant to Const 1963, art 11, § 5, for the following reasons:

1. On January 27, 1989 MERC issued a decision ordering an election in the captioned proceedings and determining that the State of Michigan was a joint employer over certain employees.

2. In reaching the decision of January 27, 1989, MERC reviewed a contract entered into between Louisiana Homes, Inc.

and the Michigan Department of Mental health and made various determinations concerning that contractual relationship, including the status of certain employees and their right to an election for the purpose of selecting an exclusive representative for collective bargaining pursuant to the Labor Mediation Act and Public Employment Relations Act.

3. The Civil Service Commission contends that various determinations made by MERC in its decision of January 27, 1989 were within the exclusive jurisdiction of the Civil Service Commission pursuant to Const 1963, art 11, § 5.

4. Const 1963, art 11, § 5 provides that "[t]he classified state service shall consist of all positions in the state service" except for a very limited number of unclassified positions.

5. Const 1963, art 11, § 5, provides that the Civil Service Commission shall "make all rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service."

6. Const 1963, art 11, § 5, provides that the Civil Service Commission "shall classify all positions in the classified service . . . fix rates of compensation for all classes of positions, [and] approve or disapprove disbursements for all personal services . . . "

7. Const 1963, art 11, § 5, provides that "[n]o payment for personal services shall be made or authorized until the provisions of this constitution pertaining to civil service have been complied with in every particular. Violations of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.

8. In view of the important jurisdictional and constitutional issues raised herein the Civil Service Commission request authority to intervene for the limited purpose of raising MERC's jurisdiction and authority to render certain decisions in the proceedings.

9. Since the Civil Service Commission currently has a virtually identical case pending in its forum, involving the same exclusive representative, entitled *AFSCME v Department of Mental Health and the State Employer* being Civil Service Case Number EL 01-88 it is respectfully requested, alternatively, that this case be stayed pending a final decision in the matter.

WHEREFORE, the Civil Service Commission and the Department of Civil Service request permission to intervene in these proceedings for the limited purpose of contesting jurisdiction based on constitutional authority of MERC over these constitutional issues and for dismissal based on lack of jurisdiction.

Respectfully submitted,

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